Case Comments

Firm Disqualification and the Former Government Attorney: *Armstrong v. McAlpin*

In *Armstrong v. McAlpin*,[1] the Second Circuit sitting en banc reversed an earlier panel decision by stating that an entire law firm did not have to be disqualified from participating in a case because one of its attorneys had substantial responsibility for the matter during his former employment with the Securities and Exchange Commission. The court found that there was no danger of possible taint to the trial; nor did the court believe that the possible appearance of impropriety resulting from the relationship outweighed the prejudice that would inure to the non-moving party should the disqualification motion be granted. The *Armstrong* decision could ultimately decide this conflict of interest problem, which is considered by many attorneys to be a key factor in the ability of government attorneys to make the transition from government to the private sector.

I. BACKGROUND

A. *Basic Ethical Standards*

The vital role of the lawyer in today's complex society mandates that attorneys recognize their function in the legal system and observe the highest standards of ethical conduct.[2] The guardians of the ethical standards of the legal profession are the courts before whom the attorney practices.[3] In the furtherance of high ethical standards, the American Bar Association (ABA) adopted the Canons of Professional Ethics in 1908.[4] The Canons, along with the ABA Ethics Committee's Formal Opinions, served to give the lawyer a guide to ethical professional conduct. In 1969, the ABA Code replaced and updated the old canons. Most courts use the ABA Code as an aid in determining the propriety of attorney conduct.[5] The courts do not, however, treat the ABA Code as the final word on what behavior is appropriate for attorneys

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1. 625 F.2d 433 (2d Cir. 1980) (en banc).

2. *See* ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preamble (1979).

3. Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975); *In re* Michaelson, 511 F.2d 882, 888 (9th Cir. 1975); Empire Linotype School v. United States, 143 F. Supp 627, 631 (S.D.N.Y. 1956).

4. D. MELLINKOFF, LAWYERS AND THE SYSTEM OF JUSTICE 934 (1975).

5. Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314 (D. Hawaii 1975); Cannon v. United States Acoustics Corp., 398 F. Supp. 209, 214 (N.D. Ill. 1975); Handelman v. Weiss, 368 F. Supp. 258, 263 (S.D.N.Y. 1973).

practicing before them.[6] The general power to review ethical questions is in the trial court, and their findings will not be disturbed without a showing that there was abuse of discretion.[7]

Government attorneys, as members of the bar, are subject to these ethical restraints.[8] The government attorney is also regulated statutorily on the matter of government conflicts of interest by the so-called "revolving door statutes." These federal[9] and state[10] statutes generally disqualify the former government attorney from participating in matters that were the subject of his employment while in government service. Criminal penalities of imprisonment or fines are provided for violation of these statutes.[11] These statutes do not regulate the cases that may be undertaken by a law firm hiring the former government attorney. This matter is too complicated for black letter criminal statutes and is therefore restricted solely by ethical principles.[12]

B. *Disqualification*

The basis on which former government attorneys and their private law firms are disqualified from a case can be found in Canons 9 and 5 of the ABA Code. Canon 9 states: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."[13] DR 9–101(B) is the ABA Code's conflict of interest rule for former government attorneys. It states: "A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee."[14] This rule is more extensive than the mere "switching sides" prevention envisioned by Canon 4 which is meant to "preserve client confidences." Canon 9 has the additional purpose of preventing misuse of government office or information.[15]

In order for the attorney to be disqualified, two facts must be established. First, it must be determined whether the "matter" involved in the present case is the same as that with which the former government attorney had some

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6. J. P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357, 1359–60 (2d Cir. 1975) (concurring opinion); Estates Theatres, Inc. v. Columbia Pictures Indus., Inc., 345 F. Supp. 93, 95 n.1 (S.D.N.Y. 1972).

7. Central Milk Producers Coop. v. Sentry Food Stores, Inc. 573 F.2d 988, 991 (8th Cir. 1978); Allegaert v. Perot, 565 F.2d 246, 248 (2d Cir. 1977); NCK Org. Ltd. v. Bregman, 542 F.2d 128, 131 (2d Cir. 1976).

8. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1979).

9. 18 U.S.C. § 207 (Supp. 1979) (disqualification of former officers and employees; disqualification of partners of current officers and employees); 16 C.F.R. § 4.1 (1980) (appearance before Federal Trade Commission); 18 C.F.R. § 1.4 (1980) (appearance before Federal Energy Regulatory Commission). *See* Note, *Conflicts of Interest and the Former Government Attorney*, 65 GEO. L.J. 1025, 1027–32 (1977).

10. *E.g.*, N.J. STAT. ANN. § 52: 13D-17 (West 1977 and Supp. 1980).

11. *E.g.*, 18 U.S.C. § 207(g) (Supp. 1979), provides for fines up to $5,000 or up to one year in prison, or both.

12. When 18 U.S.C. § 207 was drafted, provisions regarding partners and associates were excluded from the statute because the Senate Committee on the Judiciary felt this problem was one for legal ethics. S. REP. NO. 2213, 87th Cong., 2d Sess. 12 (1962). Due to the increasing complexity of this area, the argument might be made that any statute attempting to formulate a hard and fast rule would be overbroad.

13. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1979).

14. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 9–101(B) (1979).

15. United States v. Ostrer, 597 F.2d 337, 340 (2d Cir. 1979); Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank, 408 F.2d 1099, 1102 (8th Cir. 1969) (discussing predecessor of Canon 9); *See* O'Toole, *Canon 9 of the Code of Professional Responsibility: An Elusive Ethical Guideline*, 62 MAR. L. REV. 313 (1979).

connection. The "matter" may take two basic forms. The government attorney may have become familiar with the area of law associated with the government agency through interpretation and drafting, or the government attorney could have become familiar with the particular facts associated with the "matters" before the government agency. In *United States v. Standard Oil Co.*,[16] Judge Kaufman discussed the apparent risk that a government attorney might take a position with respect to a particular point of law in order to enhance later private employment.[17] The ABA Ethics Committee has suggested that familiarity with the substantive and statutory law litigated by a particular government agency is "perfectly proper" and should not in itself be a reason for disqualification under DR 9–101(B).[18] The committee would limit "matter" to "the same lawsuit or litigation" or cases involving "the same issue of fact involving the same parties and the same situation or conduct."[19] The courts have interpreted "matter" as referring to the factual relationship between two cases.[20] If the basic facts of the two cases are sufficiently similar, the two cases would constitute the same "matter" under the factual comparison test.

The second fact to be established is whether the former government attorney had "substantial responsibility" for the prior "matter." Except in cases in which the attorney had direct involvement in a matter, it is difficult to determine the extent of an attorney's participation in the "matter" while in government service. Through the supervisory hierarchy, an attorney may have a wide range of indirect relationships with a particular "matter." Knowledge acquired by subordinates may be vertically imputed to the supervisor.[21] The government attorney might also have a horizontal relationship to the "matter" merely by being a member of the particular office or agency involved.[22] This relationship parallels that of the private law firm in which it is

16. 136 F. Supp. 345 (S.D.N.Y. 1955).

17. *Id.* at 359.

18. ABA COMMITTEE ON PROFESSIONAL ETHICS, FORMAL OPINION 342, *reprinted in* 62 A.B.A.J. 517, 519 (1976) [hereinafter cited as ABA OPINION 342]. *Cf.* CITY OF NEW YORK BAR ASSOCIATION COMMITTEE ON PROFESSIONAL AND JUDICIAL ETHICS, OPINION 889, *reprinted in* 31 THE RECORD 552, 557–58 (1976) [hereinafter cited as NEW YORK OPINION 889], which would diminish the importance of familiarity-with-the-law conflicts under Canon 9, but would not totally eliminate them from consideration.

19. ABA OPINION 342, 62 A.B.A.J. 517, 519 (1976).

20. "[T]he most important consideration is not whether the two actions rely for their foundation upon the same section of law, but whether the facts necessary to support the two claims are sufficiently similar." General Motors Corp. v. City of New York, 501 F.2d 639, 651 n.22 (2d Cir. 1974) *citing* district court opinion, 60 F.R.D. 393, 402 (S.D.N.Y. 1973). *See* United States v. Ostrer, 597 F.2d 337, 340 (2d Cir. 1979); UAW v. National Labor Comm'n, 466 F. Supp. 564, 568–69 (S.D.N.Y. 1979) (court refused to find same matter just because the attorney had reviewed an FBI report on whether to continue investigation of the defendant); Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314 (D. Hawaii 1975) (attorney disqualified because of his prosecution against the same defendant regarding the same type of action); United States v. Standard Oil Co., 136 F. Supp. 345, 364 (S.D.N.Y. 1955).

21. United States v. Standard Oil Co., 136 F. Supp. 345, 362 (S.D.N.Y. 1955); Porter v. Huber, 62 F. Supp. 132 (W.D. Wash. 1946); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 665–68 (1957). Judge Kaufman is the author of the *Standard Oil Co.* opinion.

22. United States v. Standard Oil Co., 136 F. Supp. 345, 362 (S.D.N.Y. 1955).

presumed that there is inter-office discussion of cases and access to information among lawyers who practice together.[23]

Judge Kaufman believes there should be a rebuttable presumption that a supervisor has knowledge of information routed through his office.[24] He argues that the test for horizontal imputation of knowledge should be dealt with on a case by case basis, premised on the probability that a government attorney could have actually "received disqualifying information."[25] Because of the unstructured nature of horizontally imputed knowledge, it is difficult to determine when that type information has been obtained.

Once the former government attorney has been disqualified, this serves to trigger the disqualification of the attorney's firm under Canon 5.[26] DR 5–105(D) states: "If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."[27] Prior to the 1974 amendment to this rule, disqualification of affiliates was extended only to situations under DR 5–105 that did not include the disqualification of attorneys under DR 9–101(B).[28] A literal reading of the current DR 5–105(D) with DR 9–101(B), however, requires an automatic disqualification of the law firm in a case in which one of its lawyers is disqualified from participation because of his former government employment.

It is important to note that prior to the institution of the firm disqualification procedure in the 1969 Code, disqualification of firms was recognized through the formal opinions of the ABA Ethics Committee and case law.[29] The general rule was "what one member of a firm cannot do, the firm cannot do."[30]

II. Recent Bar Association Interpretations

A. *ABA Formal Opinion 342*

There is some evidence that the drafters of the amendment to DR 5–105(D) had not considered what effect the expansion of the disciplinary rule

23. United States v. Kitchin, 592 F.2d 900, 904 (5th Cir. 1979).

24. Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 667 (1957).

25. *Id.*

26. Canon 5 states: "A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client."

27. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5–105(D) (1979).

28. The former DR 5–105(D) read: "If a lawyer is required to decline employment or to withdraw from employment *under DR 5–105*, no partner or associate of his or his firm may accept or continue such employment."

29. *See* Laskey Bros. of W. Va. v. Warner Bros. Pictures, 224 F.2d 824, 826 (2d Cir. 1955); Consolidated Theatres v. Warner Bros. Circuit Management Corp., 216 F.2d 920 (2d Cir. 1954); United States v. Standard Oil Co., 136 F. Supp. 345, 360 (S.D.N.Y. 1955); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS 49, 33 (1931).

30. Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314, 1318 (D. Hawaii 1975); United States v. Standard Oil Co., 136 F. Supp. 345, 360 (S.D.N.Y. 1955).

would have on government attorneys.[31] Formal Opinion 342 (ABA Opinion 342),[32] issued by the ABA Committee on Professional Ethics in 1975, was an attempt by the committee to soften the impact of this amendment.[33]

In ABA Opinion 342, the committee argued that the unqualified application of firm disqualification is not necessary to avoid the appearance of impropriety. As an example of a literal reading being inappropriate, the committee pointed to the situation of the former private practitioner joining a government agency.[34] Reading the disciplinary rules of Canons 9 and 5 together, an entire government agency could be disqualified from participating in a matter because of the prior involvement in the matter by one of its attorneys while in private practice. The committee argued that this would be an absurd application of the disciplinary rules. The financial and prestige factors that are the basis of firm disqualification are not present in that situation.[35]

The committee declared that these interests can be eliminated from the disqualification issues concerning the law firm by isolating the disqualified former government attorney from the remaining members of the firm. By "screening" the former government attorney from any participation in the case, the former relationship with the government does not contaminate the rest of the firm.[36] The committee found comfort in the use of the words "substantial relationship" by the drafters of the disciplinary rule. It interpreted these words as defining a policy that limits interference with a party's choice of counsel to only the most necessary cases.[37] The screening procedure is a reflection of such a policy because it puts some limitation upon the set of situations in which the disqualification of a firm would be necessary.

The committee proposed a government waiver system.

> [W]henever the government agency [with whom the firm attorney was formerly associated] is satisfied that the screening measures will effectively isolate the individual lawyer from participating in the particular matter and sharing in fees attributable to it, and that there is no appearance of significant impropriety affecting the interests of the government, the government may waive the disqualification of the firm under D.R. 5–105(D).[38]

The committee also stipulated that the firm make an independent study of any possible appearance of impropriety before going forward with the case.[39]

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31. Moskowitz, *Can D.C. Lawyers Cut the Ties That Bind?*, JURIS DOCTOR, Sept. 1976, at 34–35.

32. ABA OPINION 342, 62 A.B.A.J. 517 (1976).

33. The Ethics Committee states: "Our task is to interpret D.R. 9–101(B) in light of its history and in consideration of its underlying purposes and policies." *Id.*

34. *Id.* at 521.

35. *Id.*

36. *Id.*

37. *Id. See also* United States v. Standard Oil Co., 136 F. Supp. 345, 362–63 (S.D.N.Y. 1955) which discusses the possibilities of limiting the scope of disqualification under the predecessor to Canon 9, Canon 36 of the Canons of Professional Ethics.

38. ABA OPINION 342, 62 A.B.A.J. 517, 521 (1976).

39. *Id.*

B. *D.C. Bar Proposals*

In 1976, the Legal Ethics Committee of the Washington, D.C. Bar Association published a tentative draft opinion concerning the problems of disqualification and the former government attorney.[40] This initial draft interpreted disqualification strictly under DR 5–105(D). The tentative draft, which failed to receive a majority vote by the committee,[41] concluded that if one member of a firm were disqualified from participation in a case, the whole firm should be disqualified.[42] The draft opinion was especially critical of ABA Opinion 342 for its superficial discussion of the appearance of impropriety. The D.C. Committee concluded that the problem of switching sides and abuse of government power to obtain discovery for use in later private litigation would be properly dealt with through attorney disqualification.[43] Attorney disqualification would not, however, eliminate possible manipulation of government matters in order to enhance the government attorney's relations with private firms or attempts by private firms to lure away key attorneys in order to inhibit government progress on a case. The D.C. Committee felt that absolute prohibition of government attorneys from entering private practice, although absurd because of its severity, was the only solution that would ever prohibit the latter abuses.[44] Firm disqualification was needed to guard against the disclosure of confidences obtained by the lawyer while employed with the government, and possible favored treatment by government lawyers for clients of former colleagues.[45] The D.C. Committee rejected the theory that screening would effectively alleviate these possible abuses. Government review of the screening procedure as called for in ABA Opinion 342 was also criticized as presenting an inherent conflict of its own. The committee noted that government lawyers would be under pressure to approve screening procedures in order to maintain the revolving door between the government and private sectors.[46] Frequent disqualification of firms hiring former government attorneys could greatly affect the availability of private positions for government attorneys.[47]

Bowing to the unfavorable response of many bar members to the tentative draft, the D.C. Committee changed its proposal to essentially the govern-

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40. Committee on Legal Ethics, *Tentative Draft Opinion for Comment, Inquiry 19,* DISTRICT LAWYER, Fall 1976, at 39.

41. *Former Government Attorneys in Private Practice: Final Legal Ethics Committee Proposal for Comment,* DISTRICT LAWYER, Aug.-Sept. 1978, at 44.

42. Committee on Legal Ethics, *Tentative Draft Opinion for Comment,* DISTRICT LAWYER, Fall 1976, at 42.

43. *Id.* at 41.

44. *Id.*

45. *Id.* The tentative draft opinion does not elaborate on its reason to fear this favoritism despite the fact that the former government attorney would not be involved in any of the negotiations due to his disqualification.

46. *Id.* at 42.

47. *See* Kesselhaut v. United States, 555 F.2d 791, 793–94 (Ct. Cl. 1977); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics,* 70 HARV. L. REV. 657, 668 (1957).

ment waiver system of ABA Opinion 342.[48] The proposed rule amendment instituted a procedure by which the disqualified firm member and each firm attorney participating in the matter would file affidavits prior to government waiver promising to abide by the screening procedure.[49]

The Board of Governors of the D.C. Bar did not approve the Legal Ethics Committee's final proposal.[50] The board endorsed a system in which exemption from disqualification for the firm would be automatic upon compliance with the proper screening procedures.[51] Government approval of the screen-

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48. *Former Government Attorneys in Private Practice: Final Legal Ethics Committee Proposal for Comment*, DISTRICT LAWYER, Aug.-Sept. 1978, at 44. The final proposal stated that most of the comments received were critical of the Tentative Draft; a substantial minority (8 out of 19 members) of the committee, however, were still opposed to any waiver of disqualification. *Id.* at 48.

49. DR 9-102(B) states:

(1) the imputed disqualification of one or more lawyers under DR 9-102(A) may be waived by the employing public agency or department only if the following procedures are followed and determinations made.

(a) The waiver shall be made in writing by the lawyer or other official who has principal operational responsibility for the matter for the public agency or department upon a determination by that official that the waiver is not inconsistent with the public interest. The written waiver shall state clearly the basis for the decision and shall immediately be made public insofar as publication is not inconsistent with Canon 4 or provisions of law.

(b) Prerequisites to granting the waiver shall include but not be limited to:

(1) an affidavit by the former public officer or employee attesting (i) that he or she will not participate in the matter in any way, directly or indirectly, and (ii) that he or she will not share, directly or indirectly, in any fees in the matter, and

(2) an affidavit by each private lawyer who would be participating in the manner but for the imputation of the disqualification of the disqualified lawyer, attesting (i) that he or she will not communicate about the case directly or indirectly with the disqualified lawyer, and (ii) that the client or clients have been so informed. [Eleven favored a provision for waiver or other means of avoiding the imputation of disqualification, and eight did not. Eleven favored this waiver provision and eight an alternative shown in the margin. Six favored requiring the government lawyer or other official who grants the waiver to make an affidavit. Eleven favored omitting the requirement shown in the margin, that a waiver be reviewed by a judge or other independent official.]

(2) The procedures and determinations prescribed by DR 9-102(B) (1) shall apply in the absence of other procedures adopted by the department or agency in question within its authority to prescribe rules regarding practice of present or former officials or employees of the department or agency. If a department or agency adopts procedures and specifically indicates that they are in lieu of the provisions of DR 9-102(B)(1), such procedures shall thereafter be applicable to the conduct of lawyers with respect to matters within the jurisdiction of the department or agency.

Id. at 54-55 (citations omitted).

50. *Final Revolving Door Proposal Submitted to D.C. Court of Appeals*, DISTRICT LAWYER, Apr.-May 1979, at 55. The Board did submit the Ethics Committee's proposal as an alternative to the Board-approved draft.

51. DR 9-102(B)-(D) Proposed Text.

(B) The prohibition stated in DR 9-102(A) shall not apply if the personally disqualified lawyer is screened from any form of participation in the matter or representation as the case may be, and from sharing in any fees resulting therefrom. In order to ensure such screening,

(1) The personally disqualified lawyer shall file with the public department or agency and serve on each other party to any pertinent proceeding an affidavit attesting that during the period of his or her disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation, will not discuss the matter or the representation with any partner, associate, or of counsel lawyer, and will not share in any fees for the matter or the representation; and that the personally disqualified lawyer will file and serve, promptly upon final disposition of the matter or upon expiration of the period of personal disqualification, whichever occurs sooner, a further affidavit describing his or her actual compliance with these undertakings.

(2) At least one affiliated lawyer shall file with the same department or agency and serve on the same parties an affidavit attesting that all affiliated lawyers are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedure being taken to screen the personally

ing would not be necessary, but the screening would be subject to government challenge under the court's inherent right to challenge any section of the ethics code.[52] The disqualified attorney and one firm member must submit affidavits to the government agency or department involved attesting to the screening procedure, with follow-up affidavits to be filed after the termination of the case describing the actual compliance with the procedures.[53]

C. *Bar Association of the City of New York, Opinion 889*

In 1976, the Committee on Professional and Judicial Ethics of the Bar Association of the City of New York issued Opinion 889,[54] describing the issues concerning the former government attorney. The New York committee agreed with ABA Opinion 342 that when screening procedures are sufficient to avoid the appearance of impropriety, the imputing of disqualification to the firm is unnecessary, but the committee was not willing to give the government agency involved absolute veto power over the matter.[55] The committee anticipated that the government counsel would be under pressure to take tactical advantage of any veto power. Judicial review of affidavits describing the screening procedure was favored by the committee.[56] A case-by-case factual analysis of each situation was emphasized by the committee in order to avoid unrealistic results. The committee did include a proviso stating that some situations would occur in which the prior involvement of the former government attorney would be so comprehensive that no screening device could remove the appearance of impropriety.[57] While this report did not attempt to present a rule change, it did submit a list of pertinent questions probing the situation of the disqualified attorney and the law firm's possible representation.[58]

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disqualified lawyer; and that at least one affiliated lawyer will file and serve, promptly upon final disposition of the matter or upon expiration of the period of personal disqualification, whichever occurs sooner, a further affidavit describing the actual compliance by the affiliated lawyers with the procedures for screening the personally disqualified lawyer.

(C) If a personally disqualified lawyer or an affiliated lawyer has stated in accordance with DR 9-102(B) that further affidavits describing compliance with screening procedures will be filed and served upon final disposition of the matter or upon expiration of the period of disqualification, such affidavits shall be filed and served as soon as practicable after they are due.

(D) Affidavits filed pursuant to DR 9-102(B) and (C) shall be public except to the extent that a lawyer submitting an affidavit shows that disclosure is inconsistent with Canon 4 or provisions of law.

Id. at 56.

52. Although there is no mention of the right to challenge the screening procedure in the rule proposal, the inherent right of the courts to oversee the attorneys practicing before it would supersede the ethics code. *See* notes 4–5 *supra*.

53. DR 9-102(B)(1)-(2); *Final Revolving Door Proposal Submitted to D.C. Court of Appeals*, DISTRICT LAWYER, Apr.-May 1979, at 56.

54. NEW YORK OPINION 889, 31 THE RECORD 552 (1976).

55. *Id.* at 566. *See also* Kesselhaut v. United States, 555 F.2d 791, 794 (Ct. Cl. 1977).

56. NEW YORK OPINION 889, 31 THE RECORD 552, 566 (1976).

57. *Id.* at 571.

58. Was the client involved a client of the firm before the lawyer joined the firm? Was the relationship of the client to the firm such that it could reasonably be expected that the client would look to the firm for legal services whether or not the disqualified lawyer was associated with it?

If the matter is brought to the firm after the arrival of the disqualified lawyer in the firm, were there

III. THE COMPETING INTERESTS

Analysis of the interests in the disqualification situation breaks down into four considerations. The first consideration is the public's interest in the scrupulous administration of justice.[59] This is the basis of Canon 9, which does not look to actual impropriety but the "appearance of impropriety." In the case of the firm with a disqualified former government attorney on its staff, there may not be an actual participation by the attorney in the case, but with no real way to police the disqualification, the "appearance of impropriety" may persist. The stature of the profession and the courts and the esteem in which they are held are dependent upon the complete absence of even a semblance of improper conduct.[60] Some courts have gone as far to say that when there is doubt as to the appearance of improper conduct, the case should be "resolved in favor of disqualification."[61] Alternatively, a reasonable possibility that impropriety will occur has been deemed necessary in order to disqualify.[62]

The second consideration is the resulting impropriety that would occur should the disqualified attorney participate in the case. The most important concern is that the former government attorney will abuse his responsibility to

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any discussions bearing on the matter between the disqualified lawyer and other members of the firm which are relevant to the new matter?

What is the nature of customary communication within the firm?

What was the firm's competence in the area involved prior to the arrival of the disqualified lawyer?

Upon leaving government service, did the disqualified lawyer prepare a list of matters as to which he felt he would be disqualified from accepting representation because he had "substantial responsibility" for such matters while in government service? What steps have been taken to communicate the information contained in such list to other lawyers in the firm? What steps have been taken by the firm to ensure the isolation of the disqualified lawyer from forbidden matters? Such steps may include written directives concerning matters which should be discussed with the lawyer in question, and instructions relative to files concerning these matters.

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If a client is new to the firm since the disqualified lawyer's arrival, or the nature of the matter is one not previously handled by the firm, with whom were initial client-firm discussions held? If any such discussions were held with the disqualified lawyer, did he do anything more than to state his inability to handle the matter personally and to refer the client to another, non-disqualified lawyer in the firm?

What procedures are followed by the firm with respect to new matters to determine whether there is reason to believe that the former government employee is disqualified and should therefore be isolated? Is a record kept of initial discussions upon which such determinations are based?

What was the degree and the nature of the "substantial responsibility" of the disqualified lawyer for the matter while he was in government service? How long has it been since the disqualified lawyer had any contact with the subject matter of the problem case?

What safeguards exist in the statutes, rules and regulations of the agency which might be felt by a reasonable observer to eliminate or minimize the appearance of impropriety if the firm is to take the case?

Id. at 570–71.

59. "The preservation of public trust both in the scrupulous administration of justice and in the integrity of the bar is paramount." Hull v. Celanese Corp., 513 F.2d 568, 572 (2d Cir. 1975). *See* Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

60. Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 568, 575 (2d Cir. 1973).

61. Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975), *citing* Fleischer v. A.A.P., Inc., 163 F. Supp. 548, 553 (S.D.N.Y. 1958), *appeal dissmissed*, 264 F.2d 515 (2d Cir.), *cert denied*, 359 U.S. 1002 (1959).

62. Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1974).

the government in order to enhance his future private employment.[63] This encompasses both the possibility for financial gain and the acquisition of a prestigious job. There is the possibility that the attorney will be representing a private party against his former government agency, thereby "switching sides."[64] This is a situation forbidden by both Canon 4 and 9. There is the possibility that confidential government information will be used,[65] or the attorney gained valuable information while on the public payroll.[66] As mentioned in the D.C. Bar Tentative Draft Proposal, the party might appear to be receiving favored treatment because of the former government attorney.[67]

The third consideration is the fairness to the non-moving party and the ability to choose freely his own attorney.[68] This right is certainly not absolute.[69] Often a client has retained a firm because of a long-standing relationship or the firm's special expertise.[70] Disqualification motions are becoming quite common,[71] and courts recognize the use of such motions as a tool to delay the case, increase litigation costs, and prejudice the opposing side's preparation for trial.[72] With these factors in mind, the courts carefully scrutinize motions to disqualify.[73] Parties have attempted to combat such tactics by invoking the doctrine of laches; however, the courts generally have been unwilling to invoke laches when the moving party has asked for disqualification during the preliminary stages of the trial or when prejudice has not been shown to the case.[74] The court in *Central Milk Producers Cooperative v. Sentry Food Stores,*[75] however, refused to disqualify a plaintiff's firm because of the prior participation of two new firm members who had worked on

63. United States v. Ostrer, 597 F.2d 337, 340 (2d Cir. 1979); Allied Realty of St. Paul, Inc., v. Exchange Nat'l Bank, 408 F.2d 1099, 1102 (8th Cir. 1969); Handelman v. Weiss, 368 F. Supp. 258, 264 (S.D.N.Y. 1973).

64. United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979); United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979) (appendix of district court decision).

65. Traylor v. City of Amarillo, 335 F. Supp. 423, 425 (N.D. Tex. 1971).

66. Allied Realty of St. Paul, Inc. v. Exchange Nat'l Bank, 408 F.2d 1099, 1102 (8th Cir. 1969); Handelman v. Weiss, 368 F. Supp. 258, 264 (S.D.N.Y. 1973).

67. Committee on Legal Ethics, *Tentative Draft Opinion for Comment,* DISTRICT LAWYER, Fall 1976, at 41.

68. Hull v. Celanese Corp., 513 F.2d 568, 572 (2d Cir. 1975); Society for Good Will to Retarded Children, Inc. v. Carey, 466 F. Supp. 722, 724 (E.D.N.Y. 1979); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 565 (2d Cir. 1973).

69. International Business Mach. Corp. v. Levin, 579 F.2d 271, 283 (3d Cir. 1978), *citing* Kramer v. Scientific Control Corp. 534 F.2d 1085, 1093 (3d Cir. 1976).

70. City of Cleveland v. Cleveland Elec. Illuminating Co., 440 F. Supp. 193 (N.D. Ohio 1977), *aff'd mem.,* 573 F.2d 1310 (6th Cir. 1977), *cert. denied,* 435 U.S. 996 (1978).

71. *See* O'Toole, *Canon 9 of the Code of Professional Responsibilty: An Elusive Guideline,* 62 MAR. L. REV. 313 (1979).

72. Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979); Central Milk Producers Coop. v. Sentry Food Stores, Inc., 573 F.2d 988, 992 (8th Cir. 1978); International Electronics Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975).

73. Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); J. P. Foley & Co., Inc. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975); Society for Good Will to Retarded Children, Inc. v. Carey, 466 F. Supp. 722, 724 (E.D.N.Y. 1979).

74. United States v. Ostrer, 597 F.2d 337, 341 (2d Cir. 1979); Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973).

75. 573 F.2d 988 (8th Cir. 1978).

a related case while employed with the Justice Department.[76] The moving side had been informed of the hiring of the first attorney and it "specifically approved" the screening procedure implemented. Two years later, the second attorney joined plaintiff's firm and the defendant filed a motion to disqualify. The court found that the defendant had waived the right to raise the disqualification argument by not objecting earlier.[77] It should be noted that even where a clear case of laches is present, the courts may still refuse to invoke the doctrine.[78]

The fourth consideration is the interest of the former government attorney and the law firm hiring him in not being oppressively burdened when it comes to employment opportunities through the "revolving door." Many young lawyers enter government service with the expectation of remaining there only a few years.[79] These lawyers are a valuable source of qualified attorneys for the government.[80] An overly restrictive disqualification policy could make the resulting sterilization of the government attorney too high a price to pay.[81]

IV. FACTS AND HOLDING OF *Armstrong v. McAlpin*

The disqualification issue in this case revolved around Theodore Altman, a former attorney at the Federal Securities and Exchange Commission (SEC), now a partner in the New York law firm of Gordon, Hurwitz, Butowski, Baker, Weitzen, & Shalov (Gordon firm).[82] Altman began working at the SEC in 1967, and as Assistant Director of the Division of Enforcement had "direct, personal involvement"[83] in the SEC investigation of Clovis McAlpin, Capital Growth Company, and other defendants, which led to the eventual filing of a complaint against these parties on September 3, 1974. Altman left the SEC and joined the Gordon firm as an associate in 1975.

The charges against McAlpin and the other parties consisted of alleged violations of federal securities laws. As a result of the SEC action, Michael F. Armstrong was appointed receiver of the Capital Growth Companies.[84] The SEC subsequently turned its files on the case over to the receiver. In 1976,

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76. *Id.* at 989–90.

77. *Id.* at 992.

78. Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 574 (2d Cir. 1973); Empire Linotype School v. United States, 143 F. Supp. 627, 631 (S.D.N.Y. 1956).

79. Kesselhaut v. United States, 555 F.2d 791, 793–94 (Ct. Cl. 1977); Moskowitz, *Can D.C. Lawyers Cut the Ties That Bind?*, JURIS DOCTOR, Sept. 1976, at 34.

80. *See* Committee on Legal Ethics, *Tentative Draft Opinion for Comment*, DISTRICT LAWYER, Fall 1976, at 39.

81. *See* Kesselhaut v. United States, 555 F.2d 791, 793 (Ct. Cl. 1977); Kaufman, *The Former Government Attorney and the Canons of Professional Ethics*, 70 HARV. L. REV. 657, 668 (1957). The possible constitutional argument of the fundamental right to practice law was rejected by the district court in Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314, 1317 (D. Hawaii 1975). The court held that disqualification did not deprive the attorney of a living from the practice of law.

82. 625 F.2d 433, 435 (2d Cir. 1980) (en banc).

83. 606 F.2d 28, 29 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980).

84. 625 F.2d 433, 435 (2d Cir. 1980) (en banc).

Armstrong consulted with David M. Butowski of the Gordon firm concerning the firm's possible representation of the receiver. Butowski informed Armstrong of the possible conflict because of Gordon associate Altman and his prior involvement in the case.

After both investigated the matter, Butowski and Armstrong decided that the Gordon firm could represent the receiver if steps were taken to screen Altman from any participation in the matter as prescribed in ABA Opinion 342. The receiver then applied to the district court judge having jurisdiction over the conduct of the receiver for permission to retain the Gordon firm. The appointment was approved by the court on May 13, 1976. In keeping with the procedure of ABA Opinion 342, the firm obtained a waiver from the SEC concerning any objection that agency might have against the representation. The Gordon firm was then retained by the receiver.[85]

On September 17, 1976, the receiver filed the present action in the U.S. District Court for the Southern District of New York against McAlpin, Capital Growth Company (with others) for damages in excess of $24,000,000 on charges of fraud. The defendants were served in July of 1977. After obtaining extensions from the court, the defendants, in their first appearance before the court on June 2, 1978, moved to disqualify the Gordon firm on the ground that the imputation of Altman's disqualification should be extended to the Gordon firm.[86] Both sides agreed that the present suit and former SEC investigation concern common "matter", and neither side has challenged the apparent disqualification of Altman from any participation in the case. The motion was denied by the district court and the defendants appealed to the Second Circuit.[87]

The *Armstrong* panel decision rejected attempts by both parties to present cases that were offered as helpful authority with which to decide the case.[88] No case was found by the panel to be on point. The plaintiff's claim of laches was also rejected by the court as being groundless because the defendants made the motion to disqualify during their first appearance before the court.[89]

The *Armstrong* panel decision recognized that any attempt to formulate a hard-and-fast rule in cases involving the imputation of an attorney's disqualification to the attorney's firm would fail to take into account the various policy arguments present in such disputes.[90] The court instead formulated a two-tiered test.[91] The first consideration was to determine whether the risks envisioned and guarded against by DR 9–101(B) are present in the "matter" for which the former government attorney had "substantial responsibility."

85. *Id.* at 436.
86. *Id.*
87. *Id.* at 437.
88. 606 F.2d 28, 31–32 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980).
89. *Id.* at 34 n.6. *See generally* notes 74 & 78 *supra*.
90. 606 F.2d 28, 32–33 (2d Cir. 1979), *vacated en banc* 625 F.2d 433 (2d Cir. 1980).
91. *Id.* at 33.

The court regarded the possibility that a government lawyer would be influenced by the prospects for future private employment as the most significant prohibition envisioned by the disciplinary rule. The court also recognized concerns such as possible adverse representation, disclosure of confidential information, favored treatment by the government agency, and the appearance that the lawyer is pursuing a government objective while in private practice.[92] The *Kesselhaut v. United States*[93] case was cited by the court as an example of a situation in which the safeguards of DR 9–101(B) were unnecessary. No opinion was rendered by the *Armstrong* court about the screening methods of that case, but it noted that the role of the former government attorney did not afford him the opportunity to enhance future private employment.[94] The *Armstrong* court did regard the risk of possible influence in the *Armstrong* case as "very real." The opinion did not include an analysis of the other risks it had mentioned with regard to DR 9–101(B) in either the *Kesselhaut* discussion example or in the opinion's basic test. No attempt was made to distinguish the relative importance of these other concerns.

The second tier of the test was designed to determine just what role the former government attorney had concerning the matter. The court was looking for "direct, personal involvement" in the "matter," as opposed to indirect superficial contact that the court termed a "nominal relationship."[95] The court discussed only the situation of the supervisor in the opinion, but the indirect or superficial role could well describe lawyers or clerks who perform only very basic work or research that would neither make them privy to any confidential information nor give them power to influence the prior "matter."[96] The Second Circuit accepted the attorney disqualification doctrine that knowledge acquired by subordinates is imputed to the supervisor.[97] It was unwilling, however, to automatically extend the imputation to the law firm. The court felt that in the case of limited supervisory involvement, the appearance of impropriety would be greatly diminished in terms of the need for firm disqualification.[98] The indirect contact was seen as a mitigating factor when deciding the question of whether to extend the disqualification to the firm.

The issue of when screening is appropriate was not decided, but the court did state that no screening procedure would suffice to prevent the disqualifi-

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92. *Id.* at 32. *See also* Committee on Legal Ethics, *Tentative Draft Opinion for Comments*, DISTRICT LAWYER, Fall 1976, at 40–41. The Ethics Committee of the D.C. Bar goes into detail about the various factors that could taint the government attorney's contact with private firms.

93. 555 F.2d 791 (Ct. Cl. 1977).

94. 606 F.2d 28, 33 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980). The former government attorney in the *Kesselhaut* case was general counsel for the Federal Housing Authority and had some contact with a tax abatement matter. The firm that the former government attorney later joined was hired to collect the legal fees for the firm handling the earlier tax matter.

95. *Id.*

96. Law clerks could fall into the category of persons performing very basic work. *See Final Revolving Door Proposal Submitted to D.C. Court Appeals*, DISTRICT LAWYER, Apr.-May 1979, at 51.

97. *See* United States v. Standard Oil Co., 136 F. Supp. 345, 362 (S.D.N.Y. 1955).

98. 606 F.2d 28, 33 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980).

cation of the Gordon firm. The court rejected the theory of ABA Opinion 342 that screening would eliminate any incentive toward unethical behavior.[99] The court also questioned the effectiveness of any screening procedure with regard to screening financial gains from the disqualified firm member. It emphasized that there must appear to be no possibility of financial reward by succumbing to unethical behavior while in government employ.[100]

The Second Circuit granted an en banc rehearing[101] in order to let the full circuit have input in the decision of this complex issue. The en banc court focused most of its attention on the availability of review under *Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*,[102] which was an earlier Second Circuit en banc decision allowing an immediate appeal upon the denial of a disqualification motion. The *Silver Chrysler* opinion was overruled by the *Armstrong* en banc court based on the finding that a *denial* of a disqualification motion did not fit within the exceptions to the final judgment rule established by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[103]

Cohen set up a three part test that allowed an immediate appeal of an order if: (1) the issue is independent of the merits of the case; (2) irreparable harm would result from refusal to immediately review the issue; and (3) the issue is "too important" to be "deferred until the whole case is adjudicated."[104] The en banc court did not feel that the denial of a disqualification motion adequately met the second and third requirements of the test.[105] The ability of the district court to grant a new trial or reconsider its past decisions was deemed adequate protection against irreparable harm should circumstances change during the trial. The en banc court did not consider the harm that might occur from deferring the appeal until after the whole case is decided to be any more prejudicial than other situations in which the courts have denied immediate appeals. The *Armstrong* court interpreted the *Cohen* decision as also requiring that the issue prompting immediate appeal be a legal one rather than purely factual in nature.

The en banc court decided, however, that orders *granting* disqualification should be granted immediate review.[106] Factors such as the loss of a party's desired counsel, the costs to the client, and the probable lack of a tactical purpose in seeking a review of the disqualification were cited by the court as requiring the opportunity for an immediate review. The en banc court noted that the very fact that the disqualification motion was granted by the district court itself implied that the appeal was not frivolous. The apparent lack of consistency between the analysis of situations denying disqualification

99. *Id.* at 34.
100. *Id.*
101. 625 F.2d 433 (2d Cir. 1980) (en banc).
102. 496 F.2d 800 (2d Cir. 1974) (en banc).
103. 337 U.S. 541 (1949).
104. *Id.* at 545–47.
105. 625 F.2d 433, 438–39 (2d Cir. 1980) (en banc).
106. *Id.* at 440–41.

and those granting such motions was admitted by the court, but it decided the situation called for a "practical rather than technical construction" that did not depend upon logic alone.[107]

Despite its finding that the district court order denying disqualification was not appealable, the en banc court decided to rule on the merits of the disqualification motion. The court speculated that ending the decision with the appealability issue would strand the district courts in an already "muddled" area of the law. It felt that a waste of judicial resources would result if the en banc court did not face the substantive problem.

The en banc court relied on the Second Circuit's earlier opinion in *Board of Education v. Nyquist*[108] for the rule that disqualification motions should be allowed only when there is a risk that failure to so rule would "taint the underlying trial."[109] The *Nyquist* majority opinion found that such an assault on the integrity of the trial would occur when the vigor of a representation was in doubt because of a conflict under Canons 5 and 9, or when an attorney was in a position potentially to use privileged information from a prior representation.[110] Another situation that the *Armstrong* en banc court felt might taint a trial was the situation posed by Judge Mansfield in his concurring opinion in *Nyquist*, in which the former government attorney had the opportunity to use information acquired during government service in a later private action.[111] The en banc court found neither the first two situations applied in the *Armstrong* case, and because the SEC files were released to the receiver before the hiring of the Gordon firm, there could not be an unfair use by the firm of information acquired by Altman while he was with the SEC.[112]

The appearance of impropriety was recognized by the en banc court as a possible ground for disqualification of the Gordon firm despite the lack of any threat to the integrity of the trial process, but the court rejected this ground on the facts of the *Armstrong* case. The en banc court felt that the resulting prejudice to the receiver outweighed any possible appearance of impropriety. The en banc court thus reversed the panel decision and affirmed the district court's denial of the disqualification motion.

V. ANALYSIS

A. *Taint of the Judicial Proceedings*

The en banc court derives most of its analysis on the merits from the *Nyquist*[113] case, which focused its attention on the possible taint to the adver-

107. *Id.* at 441 n.15. *See also* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).
108. 590 F.2d 1241 (2d Cir. 1979).
109. 625 F.2d 433, 444 (2d Cir. 1980) (en banc).
110. 590 F.2d 1241, 1246 (2d Cir. 1979).
111. *Id.* at 1247–48 n.1.
112. 625 F.2d 433, 445 (2d Cir. 1980) (en banc).
113. Board of Educ. v. Nyquist, 590 F.2d 1241 (2d Cir. 1979).

sary process. It is interesting that the court so extensively used *Nyquist*, for the disqualification issue in that case was not nearly as complex as the situation in *Armstrong*.

The *Nyquist* controversy was concerned with the basis for funding counsel and not with the possible use of information or conflict of interest that would affect the relative representation of the parties by counsel.[114] As a result of a conflict in seniority status, male physical education teachers hired the general counsel of the New York State United Teachers (NYSUT), an organization with which the local teachers' union was affiliated. The NYSUT provided, as part of its service to the teachers union, free legal representation for the male teachers. The female physical education teachers, whose interest was adverse to that of the male teachers, moved to disqualify the NYSUT counsel because the female teachers were indirectly subsidizing the NYSUT representation through their union dues. The disqualification did not involve any allegations that the NYSUT representation would be less than vigorous nor affected by possible access to confidential information about the women. The decision really had nothing to do with the types of issues involved in *Armstrong*.

The en banc court, however, incorporated in the *Armstrong* analysis the three situations cited in *Nyquist* in which possible taint to the trial might occur. The *Nyquist* majority opinion found a possible taint: "(1) Where an attorney's conflict of interests, in violation of Canons 5 and 9 of the Code of Professional Responsibility, undermines the court's confidence in the vigor of the attorney's representation of his client . . . or more commonly (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation. . . ."[115] The *Armstrong* en banc court also cites with apparent approval Judge Mansfield's concurring opinion in *Nyquist* for the more specific third situation resulting in possible taint when "the former Government attorney might in the later private action use information with respect to the matter in issue which was gained in confidence as a public employee and was unavailable to the other side."[116] It is not completely clear why the en banc court decided to distinguish this third situation from the majority's second situation. Justice Mansfield does not appear to be arguing for a third category in his concurring opinion. Nonetheless, the focus of the court is on the more specific case.

The potential use of privileged information obtained while in government employ was not found to be a factor in the *Armstrong* case because the SEC released its file on the government investigation of the defendant to the receiver before the Gordon firm was retained. It appears that the SEC has

114. *Id.* at 1244.

115. *Id.* at 1246.

116. 625 F.2d 433, 444 (2d Cir. 1980) (en banc), *citing* Board of Educ. v. Nyquist, 590 F.2d 1241, 1247–48 n.1 (2d Cir. 1979).

followed a policy of turning over its files to receivers in similar situations,[117] and this certainly did decrease the possibility that privileged information could be passed from Altman to the Gordon firm. Files, however, do not always constitute the entire information gathered during an investigation by the government.[118] A government attorney can become privy to much information when acquiring a working knowledge of a case during its investigation. The extent of this knowledge would depend on the closeness of the relationship the attorney had to the government investigation.[119] The *Armstrong* panel decision termed Altman's relationship to the investigation as being a "direct, personal involvement,"[120] although this was apparently in dispute. The trial court record shows that Altman's role concerning the SEC's McAlpin investigation was to direct and advise staff attorneys.[121] The reviewing courts were reluctant to delve very deeply into this factual relationship and the en banc court was probably correct in deferring this judgment to the district judge.

The question still remains as to whether a court could find a taint to the trial if the transfer of the government file had not been made. It appears certain that the en banc court did not believe that the mere combination of DR 9–101(B) and DR 5–105(D) situations blindly necessitated a finding of taint to the judicial process requiring disqualification of the Gordon firm. It is, of course, the prerogative of the court to decide the propriety of conduct before it, and when the standards of the ABA Code will control a situation.[122] The file disclosure solution will ultimately fail in the context of cases in which a former government attorney joins a firm that, at some later time, represents a client against the same government agency in a matter in which the former government attorney had some contact.[123] It is highly unlikely that the government, now in an adversarial position, will turn its files over to the opposing side, thus avoiding the third situation in *Nyquist* in which possible taint to the judicial proceeding could occur. This is definitely a significant area of contention that will undoubtedly be difficult for the district courts to side-step.

B. *The Appearance of Impropriety*

The en banc court considered an alternative analysis in the form of the "appearance of impropriety." Such an appearance could possibly constitute sufficient reason to grant the disqualification motion. The appearance of impropriety in this instance, however, was counterbalanced by the serious

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117. Amicus Curiae Brief for Panel Review, Securities and Exchange Commission, at 12, Armstrong v. McAlpin, 606 F.2d 28 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980). *See* Mills v. Electric Auto-Life Co., 396 U.S. 375, 382 (1970) (supporting the *Borak* decision); J. I. Case Co. V. Borak, 377 U.S. 426, 432 (1964); SEC v. Everest Management Corp., 475 F.2d 1236, 1240 (1972). *Contra*, Committee on Legal Ethics, *Tentative Draft Opinion for Comment*, DISTRICT LAWYER, Fall, 1976, at 40–41.

118. United States v. Ostrer, 597 F.2d 337, 340 (2d Cir. 1979).

119. *See* note 21 *supra*.

120. 606 F.2d 28, 29 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980).

121. 625 F.2d 433, 436 (2d Cir. 1980) (en banc).

122. *See* note 6 *supra*.

123. *E.g.* United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979).

consequences to the receiver that would have resulted if the disqualification had been allowed at that "late date."[124] The en banc court then cited the *Nyquist* conclusion that the "appearance of impropriety is simply too slender a reed on which to rest a disqualification order . . . particularly . . . where . . . the appearance of impropriety is not very clear."[125]

It seems somewhat inequitable to base a denial of a motion on the slowness of the judicial process. The more specific charge of laches raised by the receiver, which also focuses on the possible prejudice to the non-moving party, might have been a more relevant point of analysis. The *Armstrong* panel decision dismissed in a footnote any theory that laches should be invoked,[126] and the en banc court did not address the issue. The disqualification motion was made by the defendants during their first appearance before the court, but this was about two years after the commencement of the case. Many courts consider the first appearance before the court as the cut-off point for such motions.[127] This system, however, allows undue delay in deciding disqualification issues.

Frequently, motions by both sides can delay the first appearance before the court. In the *Armstrong* litigation, the appearance was delayed by such motions.[128] This elapsed time is the basis for much of the prejudicial effect to the non-moving party from a disqualification motion. There is no doubt that changing attorneys in mid-stream is a great burden on a party. Despite this fact, the courts have been slow to recognize laches. For example, in *International Business Machines v. Levin,*[129] the court allowed a disqualification motion six years after the original case was filed. The courts could maintain proper management of such laches defenses by requiring that any disqualification motions be made at the earliest possible moment. Early review would minimize the prejudice to the non-moving party and decrease the possible tactical value to the moving party.

Under the liberalized discovery rules,[130] it would be an easy task to ascertain whether a motion to disqualify was warranted. An interrogatory question probing possible disqualification issues should be sent to the opposing side as soon as possible. By founding any measure of the equitable speed with which a disqualification motion is made on such discovery, the court can more accurately determine whether laches is appropriate. The answer to the interrogatory is an accurate record of the moving party's knowledge concerning this issue. Should the answer to the interrogatory question be delayed or misleading, the moving party would a have verified excuse for any reasonable

124. 625 F.2d 433, 445 (2d Cir. 1980) (en banc).
125. *Id., citing* Board of Educ. v. Nyquist, 590 F.2d 1241, 1247 (2d Cir. 1979).
126. 606 F.2d 28, 34 n.6 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980).
127. *See* note 74 *supra.*
128. 606 F.2d 28, 30 (2d Cir. 1979) *vacated en banc*, 625 F.2d 433 (2d Cir. 1980).
129. 579 F.2d 271 (3d Cir. 1978).
130. FED. R. CIV. P. 26(b).

delay in making a motion to disqualify. Each party would also be responsible for updating its answers in view of subsequent hiring of lawyers by the law firm.

In order to answer questions concerning possible disqualification issues, a firm will have to make a concerted effort to evaluate the former participation of its members. The requirement of reasonably specific interrogatory questions would make the evaluation much easier. The long-run effect will be to save the firm time and effort that could eventually result in complications to the firm. Such problems as transferring work product to the new firm[131] or the possible inability of a law firm to collect its fees for services rendered before the disqualification could more easily be dealt with if disqualification comes early in a case. This approach by the moving party would negate much of the prejudice to the non-moving party, except notably that party's choice of counsel. A court weighing the appearance of impropriety against possible prejudice would still face a balancing problem, but the cause of the moving party would definitely be enhanced.

The remaining question is the solution to the en banc court's appearance analysis in a situation without the threat of blatant prejudice to the non-moving party. Because the possible prejudice to the receiver was found to outweigh the appearance of impropriety problem, the en banc court decided that it need not make a determination as to the validity of the screening process.[132] This statement implied that proper screening might negate the unethical appearance. The en banc court recognized that "reasonable minds may and do differ on the ethical propriety of screening in this context."[133] In light of the ability of a moving party to diminish the possible prejudice to the other side by an early disqualification motion, the courts may soon find themselves determining the efficacy of screening in this context.

The *Armstrong* panel decision was highly critical of the screening procedure, and refused to accept it as a solution under the *Armstrong* facts. That court also rejected the ABA Opinion 342 theory that the enforcement of disqualification only in circumstances in which the government refused to waive its objections to the screening procedure "accomplishes the goal of destroying any incentive of the employee to handle his work as to affect his future employment." Enforced screening procedures may arguably guard against concerns such as divulging confidential information obtained in the past, but it is difficult to see how the prospect of future screening, which will be enforced regardless of the propriety of the former contact between the government attorney and the law firm, would deter the government attorney from abusing his office. An unethical attorney could still render preferential treatment to a law firm in exchange for a good job in the private sector. A firm

131. Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir.), *cert. denied*, 439 U.S. 955 (1978) (the court has set up a situation where transferral of work product may be denied).

132. 625 F.2d 433, 445 (2d Cir. 1980) (en banc).

133. *Id.*

that would offer the government attorney such an inducement might be quite satisfied to risk future disqualification problems for the present prestige of a successful case. There may in fact be situations in which the involvement of the former government attorney in the matter was so great that no screening procedure can negate the appearance of impropriety.[134]

The *Armstrong* panel decision was also critical of the extent to which the former government attorney could be screened from financial participation in the case.[135] The en banc court refers to this problem only through the district court opinion, which states that Altman would receive "no remuneration from funds obtained by the firm from prosecuting" the case.[136] The panel decision was not able to foresee any effective system for adjusting earnings shares or salaries of disqualified attorneys. Indeed, none of the attempts by the various bar associations to solve the disqualification problem have offered any solution to this particular facet of the problem.[137] It would be quite incongruous to the new firm associate to have his salary decreased because of his personal disqualification from a lucrative case handled by other members of the firm. Altman is now a partner in the Gordon firm,[138] and his profit share will almost inevitably reflect the financial remuneration of the *Armstrong* case.

There is no discussion in the en banc opinion concerning the propriety of the government having a veto power in deciding the propriety of screening, as proposed in some bar solutions to the problem. The D.C. Bar Tentative Draft did mention the possibility that the government attorney reviewing the facts surrounding the screening procedure could be unduly influenced in his attempt to maintain the revolving door.[139] The New York City Bar Opinion 889 concluded there would be pressure to utilize the veto power.[140] The facts of the *Armstrong* case present another problem. In all cases of disqualification the firm in question may not be representing an interest directly opposed to the government. Altman moved from the SEC, which was litigating criminally against the defendants, to the Gordon firm, which was litigating civilly against the same defendants. The disqualification issue persists despite the lack of adversity between the Gordon firm and the government.[141] DR 9–101(B) does not require that the former participation and the present representation be adverse. The disciplinary rule requires only that the former government attorney have had a "substantial relationship" in the matter while working with

134. NEW YORK OPINION 889, 31 THE RECORD 552, 571 (1976).

135. 606 F.2d 28, 34 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980).

136. Armstrong v. McAlpin, 461 F. Supp. 622, 624 (S.D.N.Y. 1978).

137. *See* ABA OPINION 342, *reprinted in* 62 A.B.A.J. 517, 521 (1976); NEW YORK OPINION 889, 31 THE RECORD 552, 571 (1976).

138. Armstrong v. McAlpin, 625 F.2d 433, 445 n.25 (2d Cir. 1980).

139. Committee on Legal Ethics, *Tentative Draft Opinion for Comment*, DISTRICT LAWYER, Fall 1976, at 42.

140. NEW YORK OPINION 889, 31 THE RECORD 552, 556 (1976).

141. General Motors Corp. v. City of New York, 501 F.2d 639, 650 (2d Cir. 1974); Telos, Inc. v. Hawaiian Tel. Co., 397 F. Supp. 1314, 1317 (D. Hawaii 1975).

the government. The lack of an adverse interest may afford less basis for the government to reject a request to waive its objections to screening.

It is at least apparent that if the attorney wishes to circumvent the screening procedure, there is virtually no way to detect the infringement. The Second Circuit has made note of some of these problems with the screening procedure.[142] There is evidence that the ABA may be preparing to abandon this doctrine. A discussion draft of the new ABA Rules of Professional Conduct makes no mention of screening in disqualification cases,[143] although it should be noted that the present ABA Code never did mention screening procedures. Therefore, the en banc court's failure to face the screening issue may imply that this doctrine's usefulness is at an end.

C. *Immediate Appealability*

The effect of not allowing interlocutory appeals from orders denying disqualification is somewhat collateral to the substantive issues involved in these cases. In view of the many issues left hanging in the en banc opinion on the merits, however, the particular court resolving these issues and the particular time they are resolved could become important. The issue of whether orders denying disqualification are immediately appealable, and whether courts may properly allow interlocutory appeals when granting such disqualification motions may well have been settled by the Supreme Court in the case of *Firestone Tire & Rubber v. Risjord*.[144] In *Risjord*, the Eighth Circuit decided it would grant immediate appeals only in cases in which disqualification had been granted.[145]

The reasoning behind the restriction on interlocutory appeals is basically sound. The moving party has had a clear chance to litigate the disqualification argument in the district court, and should the unusual situation arise in which irreparable harm would result, an appeal would be available through the certification process under 28 U.S.C. § 1292(b)[146] or through a writ of mandamus.[147] The en banc court was greatly concerned with the possible prejudice

142. "Chinese Wall" has become the term of art describing the attempt to isolate a member or section of a firm from the rest of the firm. The court in Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1321 (7th Cir. 1978) *cert. denied*, 439 U.S. 955 (1978), rejected any attempt to use the "Chinese Wall" to modify the imputation of actual knowledge of one firm member to the rest of the firm. *See* Funds of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 229 n.10 (2d Cir. 1977) (court rejects use of "Chinese Wall" where two lawyers in the same firm represent two adverse clients); NCK Organization, Ltd. v. Bregman, 542 F.2d 128, 135 (2d Cir. 1976) (recognizing difficulty in constructing such isolation). *See also* Lipton & Mazur, *The Chinese Wall Solution to the Conflict Problems of Securities Firms*, 50 N.Y.U. L. REV. 459 (1975); Herzel & Colling, *The Chinese Wall and Conflict of Interest in Banks*, 34 BUS. LAW. 73 (1978).

143. ABA COMMISSION ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft) (1980).

144. *In re* Multi-Piece Rim Products Liability Litigation, 612 F.2d 377 (8th Cir. 1980) (en banc), *cert. granted sub nom.* Firestone Tire & Rubber Co. v. Risjord, 446 U.S. 934 (1980).

145. *Id.* at 378 (opinion circulated to all judges on circuit with all concurring in opinion).

146. *Id. See* Note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in the Federal Courts*, 45 U. CHI. L. REV. 450, 468–80 (1978).

147. *See* Melamed v. ITT Continental Baking Co., 592 F.2d 290, 296 (6th Cir. 1979); Community Broadcasting of Boston, Inc. v. FCC 546 F.2d 1022, 1027–28 (D.C. Cir. 1976).

to the non-moving party of tactical delays in the judicial process. The court's concern was manifested in its finding that the length of the *Armstrong* litigation on the disqualification matter would have constituted significant enough prejudice to the receiver that this possibility rebutted any possible appearance of impropriety.

D. *Implication of the En Banc Decision*

The basic thrust of the *Armstrong* case is that the Second Circuit is not yet ready to settle on its approach to complex ethical conflicts issues such as the one arising in *Armstrong*. The firm disqualification issue is vastly more complicated than was implied by such cases as *Telos, Inc. v. Hawaiian Telephone Co.*,[148] which extended the disqualification of a former government attorney through a single sentence stating: "what one member of a firm cannot do, the firm cannot do."[149] The complete reversal of the D.C. Bar policy towards this issue reflects the volatility of the continuing controversy. The en banc court may well have decided to let the dust settle on this issue before attempting to set a hard and fast rule.

Part of the problem is that the actual extension of the disqualification doctrine to the law firm in these cases was not the clear objective of the ABA. There is much speculation that the whole issue is the result of a drafting oversight in the 1974 amendment to DR5–104(D)[150] Other writers hypothesize that the whole furor over ethics is simply fallout from the low ebb of public confidence in the legal profession touched off by Watergate.[151] The lack of public confidence may be somewhat deserved if it is true that many attorneys are still unfamiliar with the pressing ethical issues in the legal profession.[152] The en banc court attempts to turn the tables on the public opinion argument by speculating how public confidence in the legal system would be affected if tactical motions to disqualify counsel prevented the redress of alleged frauds on the investing public.[153]

The concerns of DR 9–101(B) may serve "important values"[154] that require protection and appropriate enforcement in the more limited situation of attorney disqualification, but there is no doubt that the risk that these values will be compromised is certainly reduced in the context of the law firm. The participation of more attorneys makes the possibility of unethical behavior much less likely. Screening is certainly not a panacea, as exemplified by the rejection of the "Chinese Wall" theory when applied to law firms in general.

148. 397 F. Supp. 1314 (D. Hawaii 1975).

149. *Id.* at 1318.

150. Moskowitz, *Can D.C. Lawyers Cut the Ties That Bind?*, JURIS DOCTOR, Sept. 1976, at 34–35.

151. Burbank & Duboff, *Were the Watergate Lawyers an* EXCEPTION?, BAR LEADER Jan.-Feb. 1978, at 17.

152. *Id. See also* Goldberg, 1977 *Nat'l Survey on Current Methods of Teaching Professional Responsibility in American Law Schools*, 1977 NAT'L CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY, at IX (the author expresses surprise that all law schools do not require an ethics course in the post-Watergate era).

153. 625 F.2d 433, 446 (2d Cir. 1980) (en banc).

154. Armstrong v. McAlpin, 606 F.2d 28, 32 (2d Cir. 1979), *vacated en banc*, 625 F.2d 433 (2d Cir. 1980).

The question reduces itself to a balancing of the probability that a government attorney has been influenced or will circumvent the disqualification from the matter against the relative harm that would ensue from these acts and whether participation would constitute a sufficient appearance of impropriety.[155] Ethical issues are often not a matter of right or wrong but merely "differences of opinion among honest men . . . ."[156] Any attempt to strike a comparison between absolute enforcement or absolute indifference to firm disqualification is likely to fall within the gray area where agreement will be hard to obtain.

There has been some inferential comment that firm disqualification itself gives the appearance of impropriety to the bar.[157] Courts in general have been quick to avoid such results when enforcing "appearance" disqualification by pointing out that their rulings should not reflect on the integrity of the disqualified attorney.[158] Still, the motions have been termed "'smoke' which 'encourages the public to think there is a fire.'"[159] It appears this whole uncertainty caused the en banc court to invoke its privilege of ignoring the sometimes mechanical approach of the ABA Code in favor of what the court deemed appropriate under the circumstances.[160]

The en banc court decided, however, that ethical conflicts that do not pose a possible taint to the trial should be dealt with through the disciplinary machinery of the state and federal bars.[161] On a first reading this appears to shift the burden from the courts to the bar associations, but in view of the en banc court's inability to pin down the instances in which the taint to the judicial process would occur, it appears likely that such complex determinations will still rest with the district court. But the prospect of turning the problem over to the bar associations might easily constitute a "moral" alternative when the court is unable to come up with a fine-lined ethical alternative. Unfortunately, the party that is the object of the alleged unethical conduct would probably not benefit from a post-decision ethical ruling by the bar. It is clear that a guideline that could easily be applied by the bar associations prior to trial has not yet been devised.

VI. CONCLUSION

The *Armstrong* decision leaves many issues to be decided in future cases. The Second Circuit's taint to the underlying trial analysis will have to be reexamined when a case comes before the court in which the government did not eliminate the confidential information issue through full disclosure of its records. The appearance of impropriety analysis in the *Armstrong* opinion

155. *See* Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976).
156. Funds of Funds, Ltd. v. Arthur Andersen & Co., 567 F.2d 225, 227 (2d Cir. 1977).
157. Moskowitz, *Can D.C. Lawyers Cut the Ties That Bind?*, JURIS DOCTOR, Sept. 1976 at 35.
158. *See, e.g.* Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1385 (2d Cir. 1976).
159. Nat'l L.J., March 3, 1980, at 6, col. 1.
160. *See* note 6 *supra*.
161. 625 F.2d 433, 446 (2d Cir. 1980) (en banc).

that declined disqualification because of prejudice due to the length of the litigation is of limited value. A district court making an initial determination in a subsequent case will not be able to utilize such a factor to balance against an appearance of impropriety. The district court will then have to tread in the controversial area of determining the efficacy of firm screening as a solution to the unethical appearance problem. A better short term solution would have been to utilize the laches defense raised by the receiver. Such a decision would certainly leave many gaps to be litigated, but much of the possible prejudice to the parties could be eliminated, thus simplifying an ultimate solution. Certainly, the tactical use of the disqualification motion would be reduced by prompt filing of such motions. If nothing else, the en banc decision did serve as an indication of the circuit's dislike for the disqualification motion; the final solution to the problem, however, was certainly not decided.

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